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In the Supreme Court of the United States

OCTOBER TERM, 1959

JAMES FLOOD AND MARY EMMA STEBBINS, AS TRUSTEES OF THE TRUST CREATED BY PARAGRAPH III OF THE LAST WILL OF JAMES L. FLOOD, DECEASED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1-8) is reported at 274 F.2d 483.

JURISDICTION

The judgment of the Court of Appeals was entered on January 25, 1960 (Pet. App. 9). The petition for a writ of certiorari was filed on April 20, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon the return of commercial property which had been condemned for a term of three and one-half years, the United States must pay the owner, in addition to a fair market rental for the temporary taking, the cost of restoring the building to its original condition even though the alterations made by the United States from special to general office use caused no diminution in the building's fair market value.

STATEMENT

The United States instituted this condemnation action to acquire the temporary use of petitioners' building on Market Street in San Francisco for federal office space (R. 1-7, 33-38, 78). It occupied the building for about three and one-half years from February 1, 1951, to June 30, 1954 (R. 63-64).

At the trial to fix compensation, the parties agreed upon the amount to be paid as the reasonable rental value for use of the property during that period (R. 64). They were not able to agree, however, as to the liability, if any, which the Government incurred by reason of alterations made by it to the premises. Accordingly, that issue was tried to the District Court.

For many years prior to the taking, the 12-story building had been used in large part for medical and dental offices. These offices were partitioned into small rooms and contained special plumbing, electrical, laboratory and other fixtures adapted to that use. However, in 1944 the property had been leased

to F. W. Woolworth Company, with possession to be effective on February 1, 1951. That company was to demolish the existing building and erect a new one of three or more stories, principally for its own use (R. 63, 315-318). Pursuant to that lease, petitioners had caused all tenants to vacate prior to February 1, 1951, the date of the taking here (R. 81). After taking possession, the Government made extensive alterations at a cost of $225,000 to convert the medical and dental suites into larger offices adapted to general office usage (R. 80-81). It returned the building in that altered condition.

Petitioners contended that the Government was required to restore the building to its original condition and that, in electing not to restore it, the Government became liable for the reasonable cost of restoration, plus rental for the period required to restore it (R. 64-65). The Government insisted that the owners have no immutable right to the cost of restoring the building and that just compensation is measured by the diminution in market value of the property, if any, caused by the alterations (R. 65).

Petitioners estimated that the cost of restoring the building to its condition as of February 1, 1951, would be $600,600 (R. 65). The Government, while opposing the requirement of restoration, put the cost at $401,000 (R. 65). Both figures were based on new materials without reflecting depreciation. Petitioners further claimed $178,000 as reasonable rental value for the period required to restore (R. 65). The Government fixed a shorter term and valued it at $40,000 (R. 66). In addition, both parties offered

conflicting evidence as to the change in market value of the property (as of the date of return) resulting from the alterations. Petitioners asserted a $400,000 loss in market value. The Government estimated a gain of $225,000 (R. 66).

The District Court concluded that the Government was under an obligation to return the property in the condition in which it had been received, reasonable wear and tear excepted, and that it had breached that obligation (R. 84). In ascertaining the compensation owing because of the breach, the court found (R. 81-83) that the Government did not disrupt a going medical-dental operation; that, upon return of the building, petitioners made no effort to secure medical-dental tenants but had obtained a 95 percent occupancy by general office tenants; and that, prior to the taking, the building had ceased to be competitive in the medical-dental tenancy field because of new buildings especially designed for that purpose and that this situation had been aggravated in 1953 and 1954 by a considerable movement of such tenants to suburban areas. It further found that the highest and best use of the building on the date of return was for general offices and that the fair market value as of that date was as great as it would have been if the building had been returned in its original condition.

Then, adverting to the established criterion for measuring just compensation that "the owner is entitled to be put in as good position pecuniarily as he would have occupied if his property had not been taken," the District Court concluded that petitioners

were not entitled to any award and that the amount which they sought was "for the particular values which they attach to the building" (R. 75-76). A judgment of no compensation for this aspect of the taking was entered on June 10, 1958 (R. 88).

The Court of Appeals agreed with the findings and reasoning of the District Court and unanimously affirmed the judgment (Pet. App. 1-8).

ARGUMENT

The issue here was correctly decided by both courts below upon established principles governing the measure of compensation in federal acquisitions by eminent domain. The District Court said (R. 75): "The owners here have failed to demonstrate that they have suffered any pecuniary deprivation. For them to demand that the public is obliged to pay them almost a half a million dollars, which would presumably be used to re-install the medical-dental facilities, though their building continued to be as valuable as it was prior to the government taking, is to reimburse them for the particular values which they attach to the building."[1] The Court of Appeals agreed "that the obligation to restore, in the present circumstances, is not a contractual obligation such as may be voluntarily assumed by a private tenant, but is an obligation resting upon the United States solely in its capacity as a condemnor of the term for

[1] In this Court, petitioners do not challenge the trial court's factual findings as to the value of the building at the time of taking and at the time of return.

years. * * * We suspect that appellants would indeed have been chagrined had the United States elected to incur the expense of making the aforesaid restoration" (Pet. App. 7).

These rulings closely follow principles announced by this Court. "The compensation to which the owner is entitled * * * means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. * * * The owner's right does not depend on contract, express or implied." *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299, 304. In *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 5, when applying this principle to a taking of temporary use, the Court stated that "only that 'value' need be considered which is attached to 'property' " and that "loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship." This standard of measuring compensation, which both lower courts invoked here, has been applied in other federal cases to a return of altered property after a temporary taking.[2] It has

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[2] *United States* v. *3,901.77 Acres of Land in Marin County*, 65 F.Supp. 454, 456 (N.D. Cal.); *United States* v. *60,000 Square Feet of Land, Etc.*, 53 F.Supp. 767, 771 (N.D. Cal.); *United States* v. *37.15 Acres of Land in Mariposa County*, 77 F.Supp. 798, 803-804 (N.D. Cal.). Cf. *United States* v. *General Motors Corp.*, 323 U.S. 373, 384 (tenant may recover for "depreciation in value" of his fixtures, etc.).

also been applied to the return of altered property after expiration of a lease.[3]

Under that standard, petitioners were paid the reasonable rental value of the property for the 41 months of the taking (R. 64) and were accorded a trial to establish any diminution in market value of the property beyond ordinary wear and tear (R. 94-525). Their claim for restoration costs on the ground that an owner has an immutable "right to enjoy his property at the conclusion of Governmental use in the condition in which it was taken from him" (Pet. 12) is a subjective standard that does not reflect the transferable value inherent in the property. Of course, insofar as an owner's subjective desire as to use of his property reflects the same considerations that move buyers and sellers in the market, the owner's desired use is the equivalent of the most valuable use of the property. In that event, the cost of restoring it for that use would be a fair objective measure of his property loss.[4] But both courts below have specifically found that that is not the situation here; and their finding is not challenged.

Petitioners refer repeatedly to the salvage value of fixtures removed by the Government incidental to its alteration of the premises (Pet. 5, 7, 15). However,

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[3] *Georgia Kaolin Co.* v. *United States*, 214 F.2d 284 (C.A. 5), certiorari denied, 348 U.S. 914; *Fuselier* v. *United States*, 111 F.Supp. 471 (W.D. La.); *Spitzel* v. *United States* (C.Cls. No. 205-56, July 13, 1959); *Realty Associates, Inc.* v. *United States*, 134 C.Cls. 167, 138 F.Supp. 875.

[4] The federal cases upon which petitioners rely (Pet. 13-15) either expressly fall within this category or are instances where there was no issue on this point.

as the Court of Appeals noted (Pet. App. 8), they do not assert any liability of the United States for that value. Such salvage value might have a bearing if the case were to proceed in accordance with petitioners' subjective desire at the date of taking that the building be vacated of its medical and dental tenants and demolished. It has no separate place in their present claim for the cost of restoration to medical-dental offices because that claim includes the present cost of the removed fixtures. Similarly, it is not relevant under the principle applied by the courts below because the extent to which the fixtures added value to the property was considered in establishing that value in the building's original condition, as one step in ascertaining whether its value had been diminished by the alterations. This principle does not operate on a piecemeal basis but relates only to the over-all net enhancement or diminution in value of the property. In any event, contrary to petitioners' assertion (Pet. 15), the United States did not profit handsomely by the transaction. If, on a piecemeal basis, petitioners were entitled to the salvage value of the materials removed, the United States would be entitled to offset the greater cost of removal of all the materials.

CONCLUSION

The decision below accords with settled principles of eminent domain law and with other federal cases on the specific issue. It does not conflict with any decision of this Court or of other federal courts. It is correct and presents nothing requiring further review. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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